Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	MB Docket No. 05-311
the Cable Communications Policy Act of 1984	)	
as amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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Pursuant to the Notice of Proposed Rulemaking ("NPRM") released by the Commission in the above-captioned matter on November 18, 2005,[1] RCN Telecom Services, Inc., ("RCN"), by the undersigned counsel, hereby respectfully submits its Comments to the Commission.

I. Introduction

RCN Telecom Services, Inc. ("RCN"), is the nation's first and one of the largest broadband overbuilders, supplying voice, data, and video signals to residential subscribers over its own state-of-the-art fiber optic and coaxial network. Having invested some $5 billion to date, RCN has constructed and operates its own facilities-based broadband distribution networks in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets. RCN provides approximately 900,000 customer connections,[2] providing bundled packages of local and long distance telephone services, high-speed Internet access, and multi-channel video programming. RCN has been instrumental in

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[1] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer protection and Competition Act of 1992*, Notice of Proposed Rulemaking ("NPRM"), MB Dkt. No. 05-311, FCC 05-189, rel. Nov. 18, 2005.

[2] Each connection represents a separate service, with customers taking, on average, 2.5 services each.

introducing competition into the local telephone market, especially for residential customers, and has been at the forefront of providing an alternative to the incumbent cable operators. RCN's multichannel video programming distribution ("MVPD") services currently are offered pursuant to over 100 active local cable franchise and open video system ("OVS") agreements.

The above-captioned NPRM seeks comment on the implementation of Section 621(a)(1) of the Communications Act of 1934, and asks whether the current local franchising process unreasonably restricts entry into the video services market. RCN – as a competitive provider that successfully entered the market and now is operating pursuant to dozens of local franchise agreements – believes the current regulatory regime has worked and is working. The focus placed by the Regional Bell Operating Companies ("RBOCs") and other late entrants to the MVPD market on the local franchising process largely misses the point. The primary impediments to full and fair MVPD competition at the local level are the denial of access to programming and other anti-competitive behaviors by the cable market's dominant incumbent players, as RCN has amply documented in previous Commission proceedings.[3] Competition will be better served if the Commission directs its resources to combating these problems, rather than

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[3] *See, e.g.*, Comments of Residential Communications Network, Inc., dated July 19, 1996, CS Docket No. 96-133 (Third Annual Report); Reply Comments of RCN Telecom Services, Inc., dated Aug. 20, 1997 (Fourth Annual Report); Comments of RCN Telecom Services, Inc., dated July 13, 1998, and Reply Comments of RCN Telecom Services, Inc., dated Aug. 31, 1998, in CS Docket No. 98-102 (Fifth Annual Report); Comments of RCN Corporation, dated Aug. 6, 1999, and Reply Comments of RCN Corporation, dated Sept. 1, 1999, CS Docket No. 99-230 (Sixth Annual Report); Comments of RCN Corporation, dated Sept. 8, 2000, and Reply Comments of RCN Corporation, dated Sept. 28, 2000, CS Docket No. 00-132 (Seventh Annual Report); Initial Comments of RCN Telecom Services., Inc., dated Dec. 3, 2001, and Reply Comments of RCN Telecom Services, Inc., dated January 7, 2002, CS Docket 01-290 (Eighth Annual Report); see also Initial Comments of RCN Telecom Services., Inc., dated January 4, 2002, CS Docket 98-82 (Cable Attribution Proceeding); Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70 (AT&T/Comcast Merger); Comments of RCN Telecom Services, Inc., dated July 21, 2005, MB Docket No. 05-192 (Adelphia/Comcast/Time Warner Merger).

attempting to pre-judge when franchise terms that a locality attempts to negotiate with a new entrant will amount to an unreasonable refusal to award a cable franchise in violation of Section 621.

II. The existing local franchising system is working adequately for both competitors and the consumers they serve.

RCN, like other pioneering broadband overbuilders, entered the broadband market in the late 1990s in response to Congress' invitation in the 1996 Telecommunications Act, and in reliance on the pro-competitive intent of that Act. RCN negotiated approximately 130 local cable franchise and OVS agreements, and is operating successfully under more than 100 active agreements today.

These agreements have produced substantial benefits for both consumers and local communities. RCN provides fiber optic data networks, channel capacity for local use, financial support for public, educational, and governmental access programming, cable drops to public buildings, libraries, and schools, and other contributions to the communities it serves. In addition, RCN provides substantial revenues to local communities in the form of franchise fees that typically equal 5% of gross cable revenues. Both the Commission and the Government Accountability Office ("GAO") have recognized that the presence of a broadband overbuilder in the local cable market provides a powerful check on cable rate increases, and drives improvements in service scope and quality.[4]

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[4] "[I]n communities where head-to-head competition is present, the incumbent cable operator has generally responded to competitive entry in a variety of ways, such as by lowering prices, providing additional channels at the same monthly rate, improving customer service, [or] adding new services . . .." *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 at ¶ 197 (2002). "Competition from wire-based and DBS operators leads to lower cable rates and improved quality and service among cable operators. Competition from a wire-based

III. Obtaining local franchise agreements is not the primary impediment to MVPD competition.

According to the NPRM, potential new entrants are claiming that the local franchising process currently in place presents an unreasonable barrier to entry into the video services market. Verizon in particular has stated that the requirement of individual negotiations with each local franchising authority is the single biggest obstacle to widespread competition within the market.[5] RCN begs to differ. If RCN, a relatively small entity, can comply with the franchising procedures currently in place, then surely the RBOCs, with their far greater resources, should be able to do the same. The fact that Verizon and other late entrants need large numbers of franchises is simply a function of their vast scale – they also will need more construction crews, more installers, and more customer service representatives than do their smaller competitors. Just as the RBOCs can be expected to expend significant resources to support the latter aspects of their ambitious deployment plans, so too should they be expected to expend significant resources to obtain the required local franchise agreements in the many jurisdictions where they hope to profit.

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provider – that is, a competitor using a wire technology, such as a second cable operator, a local telephone company, or an electric utility – is limited to very few markets. However, in those markets where this competition is present, cable rates are significantly lower . . . than cable rates in similar markets without wire-based competition." U.S. Government Accounting Office, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, October 2003, Results in Brief, at 3.

[5] SBC/AT&T, for its part, apparently takes the position that local franchises are not required for IPTV services offered over its existing telecommunications facilities.

To date, there is little evidence that Verizon – the most prominent of the new entrants – has committed the necessary resources to obtain the local franchise agreements it needs, or that it has been "unreasonably refused" where the resources have been applied. Instead, Verizon has focused substantial resources on lobbying Congress and the states for relief from local franchise requirements. Where it has truly wanted agreements, and has deployed the necessary resources, it appears that Verizon has been receiving local cable franchises quickly and with little difficulty. Indeed, Verizon has reportedly succeeded in negotiating 3-year "escape clauses" in many of the agreements it has obtained thus far. This clearly implies that Verizon has not been forced into "take it or leave it" agreements by local franchising authorities, but rather has been successful in negotiating on its own terms. On the contrary, there are reports that it is Verizon that is approaching local authorities with "take it or leave it" deals.

More importantly, these opt-out clauses perhaps also signal a lack of commitment on Verizon's part to becoming a video programming provider for the long-term. If this is the case, rewriting the rules for their benefit would be especially inappropriate. Furthermore, to the extent that Verizon is able to obtain special concessions in its local franchise agreements, RCN and other existing providers are entitled to equivalent amendments, to ensure that current competitors are not unfairly disadvantaged by new entrants' entry into the local market. If the Commission is to entertain revisions to its Section 621(a)(1) procedures, a mechanism for recourse should be provided for existing competitors, in the event that local franchising authorities refuse to conform their franchises to the terms granted to Verizon and other new cable franchisees.

Verizon's potentially short-term cable franchise agreements are especially worrisome, insofar as it appears that the installation of Verizon's FiOS service may result in customers unwittingly losing their right to ever again choose a competing phone provider. RCN has received reports that Verizon is removing customers' existing copper wire connection when FiOS is installed, and that customers are being told that, therefore, they have to take their phone service from Verizon over its fiber.[6] It appears these customers no longer can elect to receive phone service from another telephone company, because the competing telephone company can no longer connect via copper to that home. This practice raises the specter of "reverse slamming," in which Verizon woos the customer with its new video service, and then holds the customer captive for phone service, even if Verizon ceases to provide the video services component.

Absent specific evidence that local franchising authorities have "unreasonably refused to award an additional competitive franchise" to the RBOCs, their complaints ring hollow. And, if they have specific evidence to present, the RBOCs can avail themselves of the same procedures under Section 621 that were available to RCN when it was negotiating its franchise agreements. Local cable franchising helps to ensures that new entrants to the MVPD market compete on equivalent terms with existing competitors, creating a fair marketplace within which competition can occur. RCN submits that the Commission should not interfere in the local franchising process without ample justification.

Additionally, the RBOCs and other late entrants to the market seemingly have ignored the other vehicles Congress has provided for the provision of video services, which are enumerated in the NPRM.[7] When appropriate, RCN negotiated agreements pursuant to the OVS

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[6] Verizon has, of course, been released from any obligation to provide access under the common carrier rules to its new fiber optic plant. *Wireline Broadband Order*, rel. Sept. 23, 2005, FCC 05-150.

[7] As the NPRM points out, "[t]he Communications Act provides new entrants four options for entry into the MVPD market. They can provide video programming to subscribers via radio

regime created by Congress in the 1996 Act.[8] This regime was specifically conceived by Congress to enable phone companies' entry into the video programming business, and expressly provides for "reduced regulatory burdens," *if that is what the new entrants seek*. However, there is no evidence that Verizon or others have made any effort to utilize OVS as a mechanism for market entry. Rather, instead of working with the tools provided by Congress in the 1996 Act, and after negotiating only a small handful of cable franchises with local jurisdictions, the RBOCs have immediately demanded sweeping, nationwide regulatory relief. This demand for special treatment should not be countenanced. RCN supports additional competition within the cable market from new MVPDs, since such competition ultimately drives the market to best serve consumers; however, special concessions should not be granted to new entrants,[9] because obtaining agreements to provide service under the existing available regulatory regimes clearly is feasible.

IV. To promote additional broadband deployment, the Commission must address the more significant impediments to competition.

As RCN and many others have persuasively documented in past Commission proceedings, the real impediments to increased broadband competition are the ongoing problems with access to "must have" programming and other anti-competitive behaviors by the cable

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communication, a cable system or an open video system, or they can provide transmission of video programming on a common carrier basis." NPRM, at ¶ 2.

[8] 47 U.S.C. § 573.

[9] In addition to seeking relief from the local franchising process, RBOCs also are seeking other unfair marketplace advantages, to the detriment of RCN and other existing competitors. RCN is being asked to move or rearrange its existing network – at RCN's expense – in order to make room for the RBOCs on utility poles and conduits. The RBOCs expect to, and have been able to, use existing poles, conduits, and rights-of-way to quickly deploy new cable-ready facilities, without having to negotiate the permits and pole attachments that RCN was required to. This simply is not fair.

MSOs. This is where Congress and the FCC should focus their attention. Enactment of pending legislation to close the terrestrial loophole and prohibit exclusive agreements for "must have" programming – in particular regional sports – is crucial to the future of video competition. Placing conditions on proposed mega-mergers like the pending Adelphia transactions, to mitigate the ability of the largest incumbents to use their market power for anti-competitive ends, will be far more important to the future of video services for consumers, and will do more to promote additional broadband deployment, than any changes the Commission might make to its procedures under Section 621 for intervening in local cable franchise negotiations.

V. Conclusion

For the reasons stated above, RCN respectfully submits that the Commission need not alter the current local franchising regulatory regime. Rather, the Commission should refocus on removing the real barriers to competition in the MVPD industry, including, in particular, addressing access to the content that is the true driver of video competition and the broadband revolution.

Respectfully submitted,

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